JUDGMENT SHEET

IN THE ISLAMABAD HIGH COURT, ISLAMABAD

WRIT PETITION NO.2391 OF 2022.

GULFRAZ AHMED
Vs.
ABDUL SHAKOOR AND OTHERS

Petitioner by	**:**	**Mr. Naeem Hussain, Advocate.**
Respondent No.1 by	**:**	**Chaudhry Muhammad Nasir, Advocate**
Respondent No.2 to 4	**:**	**Ex-parte.**
Date of Decision	**:**	**12.08.2022.**

SAMAN RAFAT IMTIAZ, J. Through the instant writ petition under Article 199 read with Article 25 of the Constitution of the Islamic Republic of Pakistan, 1973, the Petitioner has assailed the Order dated 23.05.2022 **("Impugned Order")** passed by the learned Civil Judge 1st Class, East Islamabad, whereby evidence of the Respondent No.2 was discarded.

2. Brief facts as per the Memo of Petition are that the Respondents No.1 and 2 filed a Suit for Declaration, Possession, Permanent and Mandatory Injunction against the Petitioner. On 08.03.2022, the Respondent No.1 and two other witnesses recorded their evidence by furnishing their affidavits as Exh.P.W.1 to Exh.P.W.3. On 15.03.2022, the learned Trial Court recorded documentary evidence of Respondent No.1 in the presence of the Respondents No.1 and 2's counsel. On 30.03.2022, Respondent No.2 furnished his affidavit-in-evidence as Exh.P.W.4, which fact was within the conscious knowledge of the counsel for the Respondents No.1 and 2. The Petitioner's counsel conducted cross-examination of P.W.1 to P.W.3 on 09.04.2022 and of P.W.4 on 19.04.2022. However, on 07.05.2022 the Respondent No.1 submitted an application for appropriate order for discarding the cross-examination of the Respondent No.2, which was accepted vide the Impugned Order, hence, the instant writ petition.

3. The learned counsel for the Petitioner argued that the Impugned Order is against the settled law that examination-in-chief or affidavit-in-evidence cannot be considered unless the witness has been subjected to cross-examination therefore allowing the affidavit-in-evidence to remain on record while discarding the cross-examination is erroneous. He submitted that in the instant case cross-examination was in fact conducted and no reason whatsoever has been shown by the Respondent No.1 as to why such cross-examination should be discarded despite which the Respondent No. 1's application has been allowed vide the Impugned Order. In support of his arguments, the learned counsel for the Petitioner has relied upon *Muhammad Jaleel Ahmed Siddiqui vs. Karachi Transport Corporation and another*, 1997 CLC 1510 [Karachi].

4. On the other hand, the learned counsel for the Respondent No.1 submitted that the Petitioner has no cause for grievance against the Impugned Order and if anyone it is the Respondent No.1, who should be aggrieved as the contents of the affidavit submitted by the Respondent No.2 as Exh.P.W.4 are prejudicial against the interest of the Respondent No.1. He further submitted that the present petition has been filed only to unnecessarily delay the trial and prolong litigation otherwise this case has no merits.

5. Despite service, the Respondents No.2 to 4 did not appear before the Court, therefore, they were proceeded against ex-parte vide order dated 28.07.2022.

6. I have heard the arguments and perused the record.

7. Perusal of Exh.P.W.4 shows that it has been submitted by the Respondent No. 2/ Plaintiff No.2 and titled as Affidavit-in-Evidence. The said affidavit ends with a statement that the Respondent No. 2/ Plaintiff No.2 wishes to abandon the Respondent No.1's false claim and does not wish to pursue the suit. The learned Trial Court has concluded vide the Impugned Order that such statement was sufficient to dismiss the instant suit to the extent of the Respondent No. 2/ Plaintiff No.2 instead of giving the Petitioner an opportunity to cross-examine the Respondent No. 2/ Plaintiff No.2.

8. The said conclusion is erroneous and misconceived in light of sub-section 4 of Rule 1 of Order XXIII of the C.P.C., which is reproduced here-in-below:-

> *"**1. Withdrawal of suit or abandonment of part of claim. (1) <u>At any time after the institution of a suit the plaintiff may, as against all or any of the defendants, withdraw his suit or abandon part of his claim</u>.***
>
> *(2) Where the Court is satisfied*
>
> *(a) that a suit must fail by reason of some formal defect, or*
>
> *(b) that there are other sufficient grounds for allowing the plaintiff to institute a fresh suit for the subject-matter of a suit or part of a claim,*
>
> *It may, on such terms as it thinks fit, grant the plaintiff permission to withdraw from such suit or abandon such part of a claim with liberty to institute a fresh suit in respect of the subject-matter of such suit or such part of claim.*
>
> *(3) Where the plaintiff withdraws from a suit, or abandons part of a claim, without the permission referred to in sub-rule (2), he shall be liable for such costs as a Court may award and shall be precluded from instituting any fresh suit in respect of such subject-matter or such part of the claim.*
>
> ***(4) <u>Nothing in this rule shall be deemed to authorize the Court to permit one of several plaintiffs to withdraw without the consent of the others</u>."*** [Emphasis added].

9. In view of the said provision of law, it is clear and apparent that a statement to withdraw made by one of several plaintiffs does not result in automatic withdrawal of the suit by such plaintiff in the absence of consent of the other plaintiffs. In the instant case, there is no evidence that on the date that the Petitioner's legal counsel conducted cross-examination of the Respondent No.2/Plaintiff No. 2, the Respondent No. 1/Plaintiff No. 1 had consented to the withdrawal of the suit by the Respondent No.2/Plaintiff No2.Without the consent of the Respondent No. 1/Plaintiff No.1, the Respondent No.2/Plaintiff No. 2 could not have unilaterally withdrawn the suit. Indeed no order was passed allowing withdrawal of the suit as requested vide the Affidavit produced as Exh.P.W.4.

10. In such circumstances, the cross-examination of the Respondent No.2/Plaintiff No. 2 conducted by the counsel for the Petitioner cannot be described as having no value in the eyes of the law as erroneously held vide the Impugned Order on the misconception that the statement of the Respondent No.2/Plaintiff No. 2 contained in Exh.P.W.4, whereby he has requested dismissal of the suit was sufficient to dismiss the suit to his extent.

11. The above analysis makes it abundantly clear that mere statement of one of several plaintiffs is not sufficient to withdraw the suit even to the extent of such plaintiff in view of Order XXIII, Rule 1, Sub-Rule 4, C.P.C, whereby the Court is not authorized to permit one of several plaintiffs to withdraw the suit without consent of the others. I am fortified in this view by the case of *Fazal Karim vs. Muhammad Afzal*, PLD 2003 SC 818 of which the relevant portion is as follows:

> *"16. A serious mistake has been committed by the First Appellate Court as well when it deleted the names of Muhammad Sharif and Mst. Iqbal Begum from the Memorandum of Appeal.* ***No doubt, under Order XXIII, Rule 1, C.P.C. a party at any time after the institution of a suit is at liberty to withdraw his suit or abandon part of his claim against all or any of the defendants yet, even if the principle is applied to the appeals, the Court cannot permit one of several plaintiffs to withdraw without consent of others****."[Emphasis added]*

12. For all the foregoing reasons, the instant petition is **allowed** and the Impugned Order dated 23.05.2022 is set aside with the result that the suit filed by the Respondents No. 1 and 2 against the Petitioner shall not be treated as withdrawn by the Respondent No. 2/Plaintiff No. 2 till such time as an appropriate order for withdrawal is passed in light of Order XXIII, C.P.C.

(SAMAN RAFAT IMTIAZ)
JUDGE

R.Anjam.